

**A Ketua Pengarah Hasil Dalam Negeri v Ensco Gerudi (M) Sdn
Bhd**

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NO W-01(A)-250-05/2021
AZIZAH NAWAWI, NANTHA BALAN AND LEE HENG
CHEONG JJCA
8 MAY 2023

C *Revenue Law — Income Tax — Additional assessments — Whether*
Director-General of Inland Revenue ('DGIR') acted within jurisdiction in raising
additional tax assessments against respondent — Whether s 140A of the Income
D *Tax Act 1967 ('the ITA') empowered DGIR to substitute pricing on transactions*
between respondent and another company within same Group of Companies to
reflect market value that would have been used if transaction had been entered into
between independent parties — Whether since DGIR had acted within
jurisdiction, no special circumstances existed for respondent to apply for judicial
E *review ('JR') of DGIR's decision — Whether respondent had abused process of*
court by applying for JR of DGIR's decision when it had already lodged appeal
against the decision to Special Commissioners of Income Tax ('SCIT') — Whether
SCIT was not only the judge of facts but was better placed than the court to decide
issues of mixed facts and law

F This appeal was against the High Court's allowing of a judicial review ('JR')
application by the respondent to quash the appellant's decision to issue notices
of additional assessments requiring the respondent to pay RM106,766,976 as
additional taxes and penalties for the years of assessment 2012–2017. The
G additional taxes and penalties were imposed as a result of pricing adjustments
the appellant had made to the respondent's business transactions with another
company named Ensco Labuan Ltd ('ELL'). ELL, which was in the business of
providing offshore oil and gas ('O&G') drilling services, including leasing of
drilling rigs, to O&G operators in Malaysia, was 49% owned by an American
company, ENSCO Oceanics Co LLC ('EOCL') whilst the remaining 51% of
H the shares were held by three Malaysian companies, two of whom held 24%
each and the third, 3%. The respondent, EOCL and ELL were part of the
foreign-based Ensco Group of Companies. The respondent had entered into an
agreement to lease drilling rigs from ELL which the respondent could then rent
out to its own customers. After carrying out an audit on the respondent, the
I appellant ('DGIR') took the position that the pricing of the leasing
transactions between the respondent and ELL was not at arm's length, ie, that
it did not reflect the market price which would have been used had the
transactions been entered into between unrelated independent parties. In
exercise of his powers under s 140A of the Income Tax Act 1967 ('the ITA'), the

DGIR substituted the pricing of the transactions to reflect an arm's-length pricing. This exercise showed that the respondent had earned chargeable income on which tax had not been paid. The DGIR issued the additional assessments to the respondent to pay the overdue tax. The respondent appealed to the Special Commissioners of Income Tax ('SCIT') against the DGIR's decision and also filed the JR application to quash the decision. The JR application was premised on the ground that the DGIR's decision was illegal, void, unreasonable and ultra vires his powers because, inter alia: (a) the DGIR was bound by, but failed to follow, a previous decision of the High Court, which was affirmed by the Court of Appeal, in *Ensco Gerudi (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (Application for Judicial Review No 25-101-05-2013) (unreported) ('*Ensco Gerudi* (2013)'); (b) the DGIR had wrongly relied upon s 140A of the ITA because the respondent and ELL were not 'associated persons' as defined under the ITA; and (c) the DGIR had failed in his duty to give reasons for his decision. In allowing the JR application, the High Court found that: (i) the issues raised by the DGIR's audit had been determined substantively in *Ensco Gerudi* (2013) and the DGIR's failure to abide by the same was itself an exercise of excess of jurisdiction; (ii) there was no evidence to show that the pricing of the transactions between the respondent and ELL was not at arm's length; and (iii) the DGIR had failed to give reasons for rejecting the respondent's pricing of its transactions with ELL.

Held, unanimously allowing the appeal and setting aside the High Court's decision:

- (1) It was trite law that since there was an avenue of appeal to the SCIT, the court would only exercise its power to review the DGIR's decision if the respondent was able to show exceptional circumstances such as that there was clear lack of jurisdiction on the part of the DGIR or that there was a blatant failure by the DGIR to perform some statutory duty or that there was a serious breach of the principles of natural justice. There were no exceptional circumstances in the present case to warrant the High Court judge quashing the notices of assessments issued by the DGIR (see paras 23, 31 & 84).
- (2) The subject matter of this appeal was not similar to that in *Ensco Gerudi* (2013) as the two cases concerned different provisions of the law and the interpretation of s 140A of the ITA was subject to a finding of fact, which could only be done by the SCIT, inter alia, on the transfer pricing. In *Ensco Gerudi* (2013), s 140(1)(c) of the ITA was used to disregard the transaction between the respondent and ELL and to deem the transaction as having been made between the respondent and the non-resident company. On the other hand, in the present case, s 140A of the ITA was invoked by the DGIR to substitute the pricing or make adjustments on the rig lease transactions between the respondent and ELL so that the transactions reflected arm's length pricing ie, the market

- A price if the transactions had been entered into between independent parties. *Ensco Gerudi* (2013) was, therefore, not binding on the present case and the DGIR had acted within his jurisdiction in raising the additional tax assessments against the respondent. Consequently, there were no exceptional circumstances to warrant a judicial review of the
- B DGIR's decision. The High Court should have dismissed the JR application for the parties to proceed with their appeal before the SCIT. Indeed, the respondent had abused the process of the court by applying for JR when it had already lodged an appeal to the SCIT (see paras 37–38, 40, 44–45 & 84).
- C (3) The High Court in *Ensco Gerudi* (2013) did not make any finding that the respondent and ELL were not 'associated persons'. The majority (49%) of the shares in the respondent belonged to EOCL. The remaining 51% of shares were held by three local companies, namely, Pacific Reward Sdn Bhd (3%), Crimson Bay Sdn Bhd (24%) and Prominent Vision Sdn Bhd (24%). Each of those three companies held less shares than EOCL.
- D Hence, the High Court judge erred when she literally combined the shareholding of the three local companies to hold that they, together, controlled the respondent when, in fact, the real majority shareholder was EOCL. It was not for the judge to arbitrarily make a finding that based on the 51% shareholding, the three companies had 'control' under s 139 of the ITA as this was not specifically provided for in s 139. In any event, the issue of control was both a legal and factual issue which was best left to the SCIT to decide (see paras 50 & 55–58).
- E
- F (4) The issue of pricing was a factual issue that was best left to the SCIT to decide after hearing the oral evidence of the parties concerned and the evidence of the tax and accounting experts. The courts were not experts in accounting and would not be able to ascertain the arm's length pricing merely from a reading of the affidavits and the transfer pricing documents alone. The High Court was plainly wrong to have gone into the merits of the transfer pricing and then accepting the respondent's submissions and quashing the DGIR's decision (see paras 59, 66 & 72).
- G
- H (5) The High Court judge failed to consider that in the exchange of correspondence between the respondent and the DGIR on the assessments, the DGIR had explained the reasons for his decision. In any event, there were ample documents in the course of negotiations between the parties which were self-explanatory; hence the need for the DGIR to give an overt explanation was redundant. As to whether the DGIR's reasons were acceptable, that was up to the SCIT to make a finding (see paras 74 & 78).
- I
- (6) On the issue of limitation raised by the respondent, the SCIT had the jurisdiction to consider not only whether the amount of tax sought to be recovered was excessive or incorrectly assessed or incorrectly increased

but also the plea of limitation. Since the DGIR had raised its additional assessment for Year of Assessment 2012 on 22 July 2020, the seven-year period specified in s 91(5) of the ITA had lapsed. The only exceptions to lifting the time-bar were as provided under s 91(3) of the ITA. Since the exceptions included fraud, willful default or negligence, those issues could not be decided by the High Court based merely on the affidavits. They were factual issues that could only be decided by the SCIT after a full hearing (see paras 79–80 & 82–83).

[Bahasa Malaysia summary]

Rayuan ini adalah terhadap keputusan Mahkamah Tinggi dalam membenarkan permohonan semakan kehakiman ('SK') oleh responden untuk membatalkan keputusan perayu untuk mengeluarkan notis taksiran tambahan yang memerlukan responden membayar RM106,766,976 sebagai cukai tambahan dan penalti bagi tahun taksiran 2012–2017. Cukai dan penalti tambahan telah dikenakan hasil daripada pelarasan harga yang telah dibuat oleh perayu terhadap transaksi perniagaan responden dengan syarikat lain bernama Ensco Labuan Ltd ('ELL'). ELL, yang menjalankan perniagaan menyediakan perkhidmatan penggerudian minyak dan gas luar pesisir ('O&G'), termasuk pemajakan pelantar penggerudian, kepada pengendali O&G di Malaysia, adalah 49% dimiliki oleh syarikat Amerika, ENSCO Oceanics Co LLC ('EOCL') manakala baki 51% saham dipegang oleh tiga syarikat Malaysia, dua daripadanya memegang 24% setiap satu dan yang ketiga, 3%. Responden, EOCL dan ELL adalah sebahagian daripada Kumpulan Syarikat Ensco yang berpangkalan di luar negara. Responden telah memasuki perjanjian untuk memajak pelantar penggerudian daripada ELL yang kemudiannya responden boleh menyewakannya kepada pelanggannya sendiri. Selepas menjalankan audit ke atas responden, perayu ('KPHDN') mengambil pendirian bahawa penetapan harga urus niaga pajakan antara responden dan ELL adalah secara tidak tulus, iaitu, ia tidak menggambarkan harga pasaran yang mana seharusnya digunakan sekiranya urus niaga telah dibuat antara pihak bebas yang tidak berkaitan. Dalam melaksanakan kuasanya di bawah s 140A Akta Cukai Pendapatan 1967 ('ACP'), KPHDN menggantikan penentuan harga urus niaga tersebut untuk menggambarkan penentuan harga secara tulus. Tindakan ini menunjukkan bahawa responden telah memperoleh pendapatan bercukai yang mana cukainya belum dibayar. KPHDN mengeluarkan taksiran tambahan kepada responden untuk membayar cukai tertunggak. Responden merayu kepada Pesuruhjaya Khas Cukai Pendapatan ('PKCP') terhadap keputusan KPHDN dan juga memfailkan permohonan SK untuk membatalkan keputusan tersebut. Permohonan SK adalah berdasarkan alasan bahawa keputusan KPHDN adalah tidak sah, terbatal, tidak munasabah dan ultra vires kuasanya kerana, antara lain: (a) KPHDN terikat oleh, tetapi gagal untuk mengikuti, keputusan Mahkamah Tinggi terdahulu, yang telah disahkan oleh Mahkamah Rayuan, dalam *Ensco Gerudi (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*

A

B

C

D

E

F

G

H

I

- A (Application for Judicial Review No 25–101–05–2013) (unreported) (*Ensco Gerudi* (2013)); (b) KPHDN telah salah bergantung pada s 140A ACP kerana responden dan ELL adalah bukan ‘associated person’ seperti yang didefinisikan di bawah ACP; dan (c) KPHDN telah gagal dalam kewajipannya untuk memberikan alasan bagi keputusannya. Dalam membenarkan B permohonan SK, Mahkamah Tinggi mendapati bahawa: (i) isu-isu yang dibangkitkan oleh audit KPHDN telah ditentukan secara substantif dalam *Ensco Gerudi* (2013) dan kegagalan KPHDN untuk mematuhi perkara yang sama adalah pelaksanaan lebih bidang kuasa; (ii) tiada keterangan untuk menunjukkan bahawa penetapan harga urus niaga antara responden dan ELL C tidak secara tulus; dan (iii) KPHDN gagal memberi sebab untuk menolak penetapan harga urus niaganya dengan ELL oleh responden.

Diputuskan, sebulat suara membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

- D (1) Ia adalah undang-undang yang mantap bahawa memandangkan terdapat jalan rayuan kepada PKCP, mahkamah hanya akan menggunakan kuasanya untuk menyemak keputusan KPHDN jika responden dapat menunjukkan keadaan luar biasa seperti terdapat kekurangan bidang E kuasa yang jelas pada KPHDN atau bahawa terdapat kegagalan secara terang-terangan oleh KPHDN untuk melaksanakan beberapa kewajipan berkanun atau terdapat pelanggaran serius terhadap prinsip keadilan semula jadi. Tidak ada keadaan luar biasa dalam kes ini yang membenarkan hakim Mahkamah Tinggi membatalkan notis taksiran yang dikeluarkan oleh KPHDN (lihat perenggan 23, 31 & 84).
- F (2) Perkara utama rayuan ini tidak serupa dengan yang terdapat dalam *Ensco Gerudi* (2013) kerana kedua-dua kes berkenaan adalah berkaitan dengan peruntukan undang-undang yang berbeza dan tafsiran s 140A ACP yang tertakluk kepada dapatan fakta, yang hanya boleh dilakukan oleh PKCP, G antara lain, mengenai harga pindahan. Dalam *Ensco Gerudi* (2013), s 140(1)(c) ACP telah digunakan untuk mengabaikan transaksi antara responden dan ELL dan menganggap transaksi tersebut telah dibuat antara responden dan syarikat bukan pemastautin. Sebaliknya, dalam kes semasa, s 140A ACP telah digunakan oleh KPHDN untuk H menggantikan harga atau membuat pelarasan ke atas urus niaga pajakan pelantar antara responden dan ELL supaya urus niaga tersebut mencerminkan penentuan harga secara tulus iaitu harga pasaran jika urus niaga telah dibuat antara pihak bebas. *Ensco Gerudi* (2013), oleh itu, tidak mengikat kes ini dan KPHDN telah bertindak dalam bidang I kuasanya dalam menaikkan taksiran cukai tambahan terhadap responden. Akibatnya, tidak ada keadaan luar biasa yang memerlukan semakan kehakiman terhadap keputusan KPHDN. Mahkamah Tinggi sepatutnya menolak permohonan JR untuk pihak-pihak meneruskan rayuan mereka di hadapan PKCP. Sememangnya, responden telah

- menyalahgunakan proses mahkamah dengan memohon JR apabila ia telah pun membuat rayuan kepada PKCP (lihat perenggan 37–38, 40, 44–45 & 84). A
- (3) Mahkamah Tinggi dalam *Ensco Gerudi* (2013) tidak membuat apa-apa dapatan bahawa responden dan ELL bukan ‘associated persons’. Majoriti (49%) saham dalam responden adalah milik EOCL. Baki 51% saham dipegang oleh tiga syarikat tempatan, iaitu Pacific Reward Sdn Bhd (3%), Crimson Bay Sdn Bhd (24%) dan Prominent Vision Sdn Bhd (24%). Setiap satu daripada tiga syarikat tersebut memegang saham kurang daripada EOCL. Oleh itu, hakim Mahkamah Tinggi terkhilaf apabila beliau benar-benar menggabungkan pegangan saham ketiga-tiga syarikat tempatan dalam memutuskan bahawa mereka, bersama-sama, mengawal responden sedangkan, sebenarnya, pemegang saham majoriti sebenar adalah EOCL. Ia bukanlah untuk hakim dengan sewenang-wenangnya membuat dapatan bahawa berdasarkan 51% pegangan saham, ketiga-tiga syarikat tersebut mempunyai ‘kawalan’ di bawah s 139 ACP kerana ini tidak diperuntukkan secara khusus dalam s 139. Walau apa pun, isu kawalan adalah isu undang-undang dan fakta yang sebaiknya diserahkan kepada PKCP untuk memutuskannya (lihat perenggan 50 & 55–58). B C D E
- (4) Isu penentuan harga adalah isu fakta yang sebaiknya diserahkan kepada PKCP untuk diputuskan selepas mendengar keterangan lisan pihak berkenaan dan keterangan pakar cukai dan perakaunan. Mahkamah bukanlah pakar dalam perakaunan dan tidak akan dapat memastikan penentuan harga secara tulus semata-mata daripada pembacaan affidavit dan dokumen harga pindahan sahaja. Mahkamah Tinggi jelas salah kerana mengambil kira merit harga pindahan dan kemudian menerima hujahan responden dan membatalkan keputusan KPHDN (lihat perenggan 59, 66 & 72). F
- (5) Hakim Mahkamah Tinggi gagal menimbangkan bahawa dalam pertukaran surat-menyurat antara responden dan KPHDN mengenai taksiran, KPHDN telah menjelaskan alasan keputusannya. Walau apa pun, terdapat banyak dokumen semasa rundingan antara pihak-pihak yang jelas; maka keperluan untuk KPHDN memberi penjelasan secara berlebihan adalah sia-sia. Sama ada alasan KPHDN boleh diterima, itu terpulang kepada PKCP untuk membuat dapatan (lihat perenggan 74 & 78). G H
- (6) Mengenai isu had yang dibangkitkan oleh responden, PKCP mempunyai bidang kuasa untuk mempertimbangkan bukan sahaja sama ada jumlah cukai yang ingin diambil semula adalah berlebihan atau disalahtaksir atau disalahnaikkan tetapi juga perakuan had. Memandangkan KPHDN telah menaikkan taksiran tambahannya untuk Tahun Taksiran 2012 pada 22 Julai 2020, tempoh tujuh tahun yang dinyatakan dalam s 91(5) I

- A ACP telah luput. Satu-satunya pengecualian untuk menarik balik had masa adalah seperti yang diperuntukkan di bawah s 91(3) ACP. Memandangkan pengecualian termasuk penipuan, keingkaran yang disengajakan atau kecuaiian, isu tersebut tidak boleh diputuskan oleh Mahkamah Tinggi berdasarkan affidavit sahaja. Ia adalah isu fakta yang hanya boleh diputuskan oleh PKCP selepas pendengaran penuh (lihat perenggan 79–80 & 82–83).]
- B

Cases referred to

- C *Bintulu Lumber Development Sdn Bhd v Director General of Inland Revenue* Civil Appeal No 01(f)-28–10 of 2019 (Q) (unreported), FC (refd)
Ensco Gerudi (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (Application for Judicial Review No 25–101–05–2013) (unreported), HC (distd)
Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185, SC (folld)
Kerajaan Malaysia v Dato’ Hj Ghani Gilong [1995] 2 MLJ 119; [1995] 3 CLJ 161, FC (refd)
- D *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563, FC (refd)
Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd [2017] 2 MLJ 197; [2017] 5 CLJ 283, CA (refd)
- E *MM Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] MSTC 10-046 (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Glugor dengan Tanggungan [1999] 3 MLJ 1, FC (refd)
Sun Man Tobacco Co Ltd v Government of Malaysia [1973] 2 MLJ 163; [1973] 1 LNS 144, FC (refd)
- F *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555, CA (refd)
Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor [2004] 6 MLJ 53, HC (refd)
- G

Legislation referred to

- Income Tax (Transfer Pricing) Rules 2012 (repealed by Income Tax (Transfer Pricing) Rules 2023)
- H Income Tax Act 1967 ss 91(3), (5), 99, 113(2), (2)(b), 139, 140, 140(1)(a), (1)(b), (1)(c), (1)(d), (6), 140A, 140A(2), (3), (5), (5)(c), Schedule 7A para 9(b), 9(cc)
- Rules of Court 2012 O 53 r 3

Appeal from: *Ensco Gerudi (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2021] MLJU 1229 (High Court, Kuala Lumpur)

- I *Ahmad Isyak bin Mohd Hassan (with Azleena Md Khairuddin) (Inland Revenue Board of Malaysia) for the appellant.*

Jason Liang Dinghui (with Kellie Allison Yap Siu Yiin and Ng Anlynn) (Wong & Partners) for the respondent.

A

Azizah Nawawi JCA:

[1] This is an appeal by the Director General of Inland Revenue ('DGIR') against the decision of the learned High Court judge dated 3 May 2021 in allowing the respondent's application to quash the decision of the DGIR.

B

[2] The decision of the DGIR is in respect of the notice of additional assessment dated 22 July 2020 and the audit findings dated 23 October 2019, 30 January 2020 and 22 June 2020 for the assessment for Year of Assessment ('YA') 2012–2017. These are based on the DGIR's decision to make adjustments on the respondent's transaction with Ensco Labuan Ltd under s 140A of the Income Tax Act 1967 ('the ITA').

C

D

[3] Having considered the appeal records and the submissions of all parties, we have allowed the DGIR's appeal and these are the grounds for our decision.

SALIENT FACTS

E

[4] The respondent is a private limited company incorporated in Malaysia on 29 July 1994, and is primarily involved in the business of providing offshore drilling services, including leasing of drilling rigs to oil and gas operators in Malaysia.

F

[5] From the transfer pricing document ('TP document') of the respondent, it shows that the respondent is wholly owned by a United States based company, ENSCO Oceanics Co LLC. The legal structure of the Ensco Group of Companies includes both the respondent and Ensco Labuan Ltd ('ELL'). From para 5.1 of the TP document, both the respondent and ELL are affiliates within the Esco Group:

G

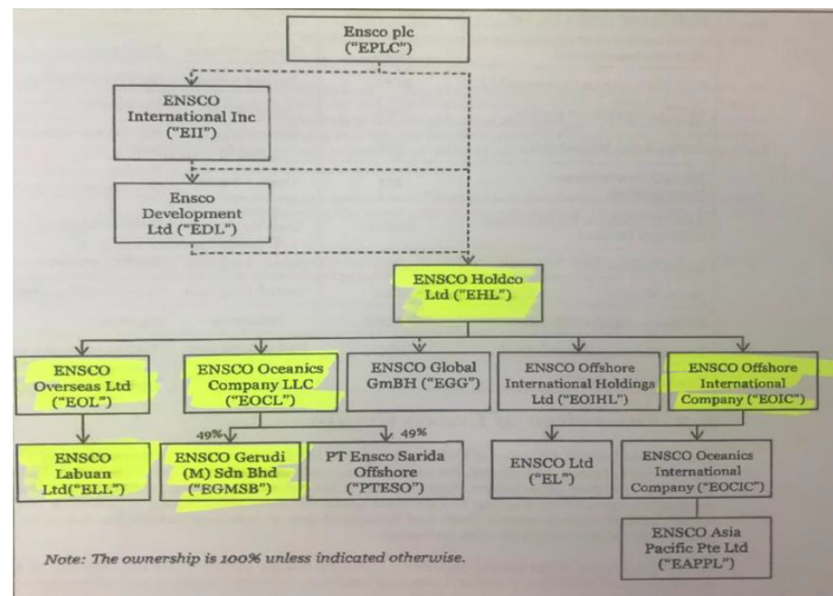
5 January Legal Structure

EGMSB is 49% owned by EOCL, a company incorporated in the USA. The ultimate holding company of the Group is Ensco Plc (EPLC), which undertakes its operation through numerous affiliate within the group.

H

The legal ownership structure of EGMSB during the period under review, mapping out the linkage with its related party companies (ie companies within the ENSCO Group) is shown below:

I

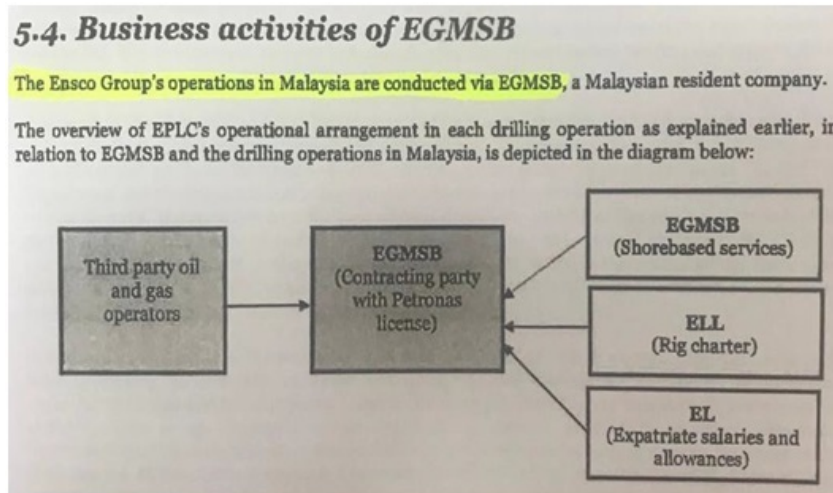


[6] In para 5.4 of the TP document, the operations of Ensco Group of Companies in Malaysia are conducted via the respondent and other related companies:

5.4. Business activities of EGMSB

The Ensco Group's operations in Malaysia are conducted via EGMSB, a Malaysia resident company.

The overview of EPLC's operational arrangement in each drilling operation as explained earlier, in relation to EGMSB and the drilling operations in Malaysia, is depicted in the diagram below:



[7] In order to provide the services to the oil and gas operators in Malaysia, the respondent entered into a master charter agreement dated 21 September 2006 (amended on 17 August 2011) ('master charter agreement') with ELL, to lease drilling rigs from ELL. The respondent then rents out the drilling rigs to its own customers

[8] As part of the master charter agreement, the respondent agreed to pay ELL a percentage of the applicable day rate that the respondent earns from its drilling contracts with its customers for the drilling rigs.

[9] By way of a letter dated 12 October 2018, the DGIR initiated its audit on the respondent for the YA 2015 to 2017. The DGIR requested for further and specific information and documents from the respondent during the course of the audit. The respondent had duly complied with the DGIR's requests.

[10] The DGIR issued its first audit findings in a letter 23 October 2019 where it took the position that the pricing of the leasing transactions between the respondent and ELL are not at arm's length pursuant to s 140A of the ITA. The DGIR proposed that the profit earned by ELL should remain with respondent by reducing the cost of the leasing asset by 20% or equivalent to the margin obtained by ELL.

- A [11] The respondent responded via two letters dated 22 November 2019 and 3 December 2019.
- B [12] Via a letter dated 30 January 2020, the DGIR issued an explanation letter, ‘surat penemuan semakan kes bagi TT 2012 hingga 2017’ in response to the respondent’s letter dated 22 January 2019 and 3 December 2019. The DGIR explained that all the response and explanations by the respondent has taken into consideration and the relevant adjustment will be followed suit. On the issues of the lease and ELL, the DGIR maintained their initial stand.
- C [13] On 11 February 2020, a meeting was held between the representative of the respondent and the DGIR regarding the issues of payment of lease and ELL. The respondent also issued a letter dated 11 February 2020 to the DGIR.
- D [14] In a letter dated 28 February 2020, the respondent again explained their stand on the issues regarding the payment of lease and ELL where the respondent contended that these issues had been determined by the High Court and that the DGIR had failed to abide by the High Court case of *Ensco Gerudi (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (Application for Judicial Review No 25–101–05–2013) (unreported) (*‘Ensco Gerudi (2013)’*).
- E [15] The DGIR issued a letter ‘Surat Pemberitahuan Keputusan Penemuan Semakan bagi Tahun Taksiran 2012 hingga 2017’ dated 22 June 2020 to the respondent. Through this letter, the respondent was informed of the final decision of the review and appeal with regard to the issues raised in the letter dated 23 October 2019.
- F [16] Aggrieved by the DGIR’s assessment, the respondent filed an application to review the decision of the DGIR, seeking the following reliefs:
- G (a) an order for certiorari to remove this honourable court for the purpose of it being quashed, the decision of the DGIR in the form of notices of additional assessment dated 22 July 2020 and audit findings dated 23 October 2019, 30 January 2019 and 22 June 2020 for years of assessment 2012, 2013, 2014, 2015, 2016 and 2017 amounting to RM10,942,878.05, RM23,834,114.85, RM35,717,009.25, RM25,719,036.25, RM6,430,898.05 and RM4,123,039.57 (collectively amounting RM106,766,976.02), in additional taxes and penalties for the respective years on the following grounds:
- H
- I (b) leasing expenses paid to Ensco Labuan Ltd for years of assessment 2012 to 2017:
- (i) the DGIR’s decisions are illegal, void and in excess of authority and/or unreasonable when the DGIR attempted to make

- adjustments on the respondent's transaction with ELL under s 140A of the Income Tax Act 1967 when the respondent (49% owned by Ensco Oceanics Co LLC, and 51% own by collectively by Prominent Vision Sdn Bhd, Crimson Bay Sdn Bhd and Pacific Reward Sdn Bhd) and ELL (wholly owned by Ensco Overseas Ltd) is not an associated person with one another within the definition provided for under the Income Tax Act 1967; A
- (ii) notwithstanding the above, the DGIR's decisions are illegal, void and in excess of authority and/or unreasonable when the DGIR decided that the payments made by the respondent to ELL for the leasing charges are not concluded at arm's length rate and ought to be calculated based on a profit split method without providing any proper function, asset and risk analysis to justify its assertion. B
- (c) a declaration that the DGIR had acted ultra vires its powers under s 91(5) of the Income Tax Act 1967 when it issued notice of additional assessment dated 22 July 2020 for years of assessment 2012, more than seven years after its expiration to make assessment, without providing any basis or any proof to lift the time bar under s 91(3) of the Income Tax Act 1967; C
- (d) a declaration that the DGIR acted ultra vires its power when it attempted to invoke s 140A of the Income Tax Act 1967 without any proper and/or reasonable basis on the applicant's non-associated transaction; and D
- (e) a declaration that the leasing expenses paid by the respondent to ELL is done at an arm's length rate as reflected in the respondent's transfer pricing documentations reflecting the respondent's use of the transactional net margin method, in line with s 140A of the Income Tax Act 1967, Income Tax (Transfer Pricing) Rules 2012 and the respondent's Transfer Pricing Guidelines 2012. E
- [17] The respondent's application for judicial review are based on the following grounds: F
- (a) DGIR had acted in excess of its jurisdiction when it failed to act in accordance with the earlier *Ensco Gerudi* (2013) case; G
- (b) DGIR unlawfully invoked s 140A of the ITA when it was clear that the respondent and ELL were not 'associated persons' with one another within the definition of the ITA; and H
- (c) DGIR had breached its duty to provide reasons when it issued the decisions without providing any clear reasons and/or justifications as to: I
- (i) how the respondent and ELL were associated persons; and

A (ii) the DGIR's preferred pricing methodology.

[18] After hearing the parties, the learned judge had allowed the respondent's application and the DGIR's decision was accordingly quashed.

B DECISION OF THE HIGH COURT

[19] In the High Court, the issues for determination by the learned judge were as follows:

- C** (a) whether the decision in *Ensco Gerudi* (2013) is binding on the parties and that the DGIR's decisions were illegal and in excess of its jurisdiction?
- (b) are the respondent and ELL controlled by the same third person for s 140A of the ITA to be invoked?
- D** (c) does the DGIR have a duty to give reasons for its decisions, and if so, has the DGIR breached that duty? and
- (d) do the DGIR's actions and/or failures amount to exceptional circumstances for a judicial review application?
- E**

[20] Having considered the application and after hearing the parties, the learned judge made the following findings:

- F** (a) that the issues raised by the DGIR's audit have been determined substantively in *Ensco Gerudi* (2013) case;
- (b) that the issue of control has been resolved in 2013 and therefore the DGIR cannot invoke s 140A(2);
- G** (c) that there is no evidence adduced by DGIR to show that the pricing of the transaction is not at arm's length as the transfer pricing policy between the applicant and the ELL remains the same;
- (d) that the DGIR had the duty to give reasons for its decision in rejecting the respondent's pricing and had failed to do so;
- H** (e) that DGIR had failed to particularise the basis of its exercise of power under s 91(3) of the ITA and this is fatal; and
- (f) that the DGIR's decision is illegal, unreasonable, made in excess of jurisdiction and a breach of natural justice.
- I**

[21] In gist, the learned judge is of the of view that the issue and facts surrounding the *Ensco* (2013) case and the case before this appeal are the same and therefore, the DGIR's decision not to abide with the decision in *Ensco* (2013) is by itself an excess of jurisdiction by the DGIR.

OUR DECISION

A

[22] It is not in dispute that the respondent has also filed an appeal to the Special Commissioners of Income Tax ('SCIT') under s 99 of the ITA.

B

[23] It is trite law that where there is an avenue of appeal to the SCIT, the court would only exercise its judicial review powers in exceptional circumstances, such as a clear lack of jurisdiction or a blatant failure to perform some statutory duty or a serious breach of natural justice. In *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185, the Supreme Court laid down the following principles:

C

- (a) judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant, it will only be exercised in exceptional circumstances; and
- (b) the applicant must show exceptional circumstances, such as a clear lack of jurisdiction or a blatant failure to perform some statutory duty or a serious breach of natural justice.

D

[24] In *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Glugor dengan Tanggungan* [1999] 3 MLJ 1, the Federal Court made the following findings:

E

- (a) there are certain classes of cases such as planning, employment and tax cases whereby a statute provides for a special appeal procedure, and so the courts understandably may not grant judicial review. However, this is always subject to the grant of review in certain cases, for example, where an applicant is able to demonstrate excess or abuse of power, or breach of natural justice (pp 40B-F); and
- (b) where the main grounds of judicial review are that the public body had acted unfairly, abused its powers, judicial review is more appropriate, as the issues raised are issues of public importance, going beyond the significance of the case itself (pp 40H-41B).

F

G

[25] The above principles were adopted by Justice Low Hop Bing in *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2004] 6 MLJ 53. On the facts of the case, His Lordship held that the issues of the validity of the notices and the errors of law may be raised as issues before the Special Commissioners, where the applicant is given every opportunity to present its case in the tribunal of the first instance. The High Court decision was affirmed by the Court of Appeal in *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555, where this court held at p 567:

H

I

[21] The Supreme Court thus in *Jagdis Singh* had held that the discretion is still with the courts to act by way of judicial review, but where there is an appeal procedure

- A available to the applicant, certiorari should not normally issue save in exceptional circumstances (see also *R v Chief Constable of Merseyside Police; ex parte Calveley & Ors* [1986] QB 424).
- [22] To repeat *the guidelines of Jagdis Singh, the exceptional circumstances in the circumstances of this appeal required to be established by the appellant were that:*
- B
- (a) *the first respondent had a clear lack of jurisdiction; or*
- (b) *there was a blatant failure by the first respondent to perform some statutory duty; or*
- C
- (c) *there was a serious breach of the principles of natural justice.* (Emphasis added.)

[26] In *Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd* [2017] 2 MLJ 197; [2017] 5 CLJ 283, this court held as follows:

- D [22] *The principle that the court retained the power to judicially review the decision of a public authority, but where there was an alternative remedy of appeal, leave to bring judicial review proceedings would only be granted in exceptional circumstances would entail the necessity on the part of the respondent to show to our satisfaction the existence of such exceptional circumstances. The effect of the failure by the respondent to establish special circumstances necessarily followed that the legal precept that an alternative remedy was available and yet to be exhausted would therefore return to the forefront for consideration (Ta Wu Realty Sdn Bhd). The decision in Jagdis Singh thus laid down a lucid and authoritative guiding principles enunciated by none other than the highest court of the land which this court was bound to follow. Therefore, the principle remains a good law here that the way is open for this court to hold that the above case authorities should apply to the appeal before us especially when these authorities deal specifically in revenue matters where an alternative and specific remedy is expressly provided under s 109H of Act 53. It is beyond question that this position is not an option but the law that ought to be complied with and applied to the instant application.* (Emphasis added.)
- E
- F

- G
- [27] In *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563 (FC), Zainun Ali FCJ in Her Ladyship's supporting judgment reasons at p 594 (Column H-I) held that a party who is dissatisfied with an assessment or notice of assessment issued by the Revenue
- H has the remedy to exercise its right to appeal under s 99 of the Act:

- [127] A party who is dissatisfied with an assessment or administrative decision issued by the Revenue under ss 109 or 109B is not left without any remedy. In the circumstance of this case, if it is *dissatisfied with assessment or notice of assessment issued by the appellant, the first respondent ought to have exercised its right to appeal under s 99 of the Act.* Before the Special Commissioners, the first respondents would have an opportunity to make known its dissatisfaction. It will have the opportunity to tender exhibits and give evidence if necessary. (Emphasis added.)
- I

[28] The above legal positions was reaffirmed by the Federal Court in

Bintulu Lumber Development Sdn Bhd v Director General of Inland Revenue Civil Appeal No 01(f)-28–10 of 2019 (Q) (unreported) where the apex court had reaffirmed the legal position that the applicant must establish exceptional circumstances to review the DGIR's assessment, when there is a statutory appeal remedy prescribed under the ITA. Otherwise, the court would not intervene, and the taxpayer should dispute the notice of assessment before the SCIT.

A

B

[29] Four questions were posed before the Federal Court for its determination in the *Bintulu Lumber Development Sdn Bhd* case which are:

C

- (a) whether the interpretation of Schedule 7A, paras 9(b) and 9(cc) of the Income Tax Act 1967 ('the ITA'), being a question of law going to the legality of the respondent's conduct in raising notices of additional assessment gives rise to exceptional circumstances justifying the granting of leave for judicial review under O 53 r 3 of the Rules of Court 2012;
- (b) whether the question of law being a matter of public importance affecting an important industry of the country's economy would give rise to exceptional circumstances justifying the granting of leave for judicial review under O 53 r 3 of the ROC 2012;
- (c) whether it is justifiable for the applicant to challenge the respondent's decision through JR instead of the alternative remedy of SCIT appeal where the issue goes to the very legality of the respondent's conduct; and
- (d) whether the respondent's unilateral decision to impose penalty under s 113(2) of the ITA upon the applicant — was in excess of jurisdiction or power conferred by s 113(2) and (b) without affording the applicant the opportunity to be heard and/or reasons for its decision, gives rise to exceptional circumstances justifying the granting of leave for judicial review under O 53 r 3 of the ROC.

D

E

F

G

[30] Upon delivering the judgment, the five members of Federal Court judges led by Chief Judge of Malaya, YAA Tan Sri Dato' Sri Azahar bin Mohamed have unanimously decided as follows:

H

First of all, we would like to thank both parties for the DGIR and respondent's counsel for their very helpful and comprehensive submissions, oral and also written which we have considered.

This is our unanimous decision. In respect of Question 1, we answered it in the negative because in our judgment, the DGIR has acted lawfully in following the decision of Schedule 7A of the Income Tax Act by the courts.

I

In respect of Question 2, we also answered it in the negative. *We are not persuaded that the question of law is a matter of public importance that would give rise to exceptional circumstances justifying granting of judicial review.*

- A** In view of our decision with respect to Questions 1 and 2, we are of the opinion that there is no necessity to answer Questions 3 and 4. For those reasons, we would then dismiss this appeal with cost. (Emphasis added.)
- B** [31] Therefore, the guidelines by the Supreme Court in *Jagdis Singh* remain instructive and binding, and the onus is on the taxpayer to establish the exceptional circumstances before the court may review the decision of the DGIR with regards to an assessment, instead of pursuing an appeal under s 99 of the ITA. The taxpayer had to establish any of the following exceptional circumstances:
- C** (a) the DGIR had a clear lack of jurisdiction;
- (b) there was a blatant failure by the DGIR to perform some statutory duty; or
- D** (c) there was a serious breach of the principles of natural justice.
- [32] The main ground of the respondent's application to review the DGIR's decision is on the alleged clear lack of jurisdiction, and this is encapsulated in issues (i) and (iv) before the learned judge:
- E** (i) Whether the decision in *Ensco Gerudi* (2013) is binding on the parties and that the DGIR's decisions were illegal and in excess of its jurisdiction? and
- (iv) Do the DGIR's actions and/or failures amount to exceptional circumstances for a judicial review application?
- F** [33] The respondent took the position, which was accepted by the learned judge, that the decision of the High Court in *Ensco Gerudi* (2013), which was affirmed by this court, binds this case in two ways (see para 24/written submission):
- G** (a) The prerequisites that need to be met to invoke ss 140(6) and 140A(2) *are the same. It requires the DGIR to be satisfied that:*
- EGMSB is in control of ELL or vice versa; and/or
- to be controlled by some other person who also has control over ELL.
- H** Dato' Zaleha binti Yusof J (as Her Ladyship then was) considered the relationship between EGMSB and ELL, and concluded that the test of control was not met to even invoke s 140(6). The judgment was approved by the Court of Appeal. The facts surrounding the relationship between the two companies have not changed. The DGIR remains unable to dislodge the factual findings of Her Ladyship. As such, the judgment on 'control' continues to bind the parties, and consequently, the DGIR
- I** does not have the power to invoke s 140A(2) against EGMSB.
- Indeed, in the present case, the learned High Court Judge Dato' Noorin J came to

the same conclusion. Her Ladyship considered the decision in *Ensco Gerudi* (2013) and the DGIR's reasoning in this case in paras 20–40 of her grounds of judgment, thereby finding that:

[21] In the same case, the respondent further attempted to rely on s 140(6) of the ITA and alleged that the applicant and ELL are within the same Group of Companies and as such the transaction arising out of the master charter agreement between them were not at arm's length. Notwithstanding the issue arose only in the respondent's written submission therein, the High Court addressed the issue and found that there was no evidence adduced by the respondent showing that the applicant and ELL had transacted on a non-arm's length basis. The High Court found that the respondent showed scant scrutiny in proving the applicant to be in control of ELL or vice versa and/or to be controlled by some other person who also have control over ELL. The learned High Court Judge, Zaleha Yusof J (as Her Ladyship then was), went on further and stated as follows:

[28] Merely because both companies belong to the same Group of Companies does not mean that the same person of (sic) entity controls them both. Especially when the applicant is also made of Bumiputera shareholders whose interest would be unfairly disregarded. It is important to note that the shareholders of the applicant and ELL are not similar at the point of incorporation. In the circumstances, the test applicable to enable the respondent to invoke s 140(6) of Act 53 are not (sic) fulfilled in this case.

(b) Even if the test of control is satisfied, which EGMSB firmly denies, Dato' Zaleha binti Yusof J (as Her Ladyship then was) also made the findings that there is no evidence before the court that the pricing of the transactions was not at arm's length. The transfer pricing policy between EGMSB and ELL have not changed. The transactions in dispute are also the same. Therefore, these findings continue to bind the DGIR and it is not for the DGIR to insist otherwise, see para 28 of the High Court's grounds of judgment in *Ensco Gerudi* (2013).

[34] We are of the considered opinion that in the *Ensco Gerudi* (2013) case, the DGIR's decision is mainly based on an anti-avoidance case under s 140(1)(c) of the ITA. The DGIR in that case had invoked s 140(1)(c) to disregard the transaction between the respondent and ELL. In the present appeal, the DGIR's assessment is based on s 140A, which is a new provision. The differences in facts and issues between *Ensco Gerudi* (2013) case and the present appeal have been summarised by the DGIR to be as follows:

A		Ensco Gerudi (2013)	Ensco (2020)
	Relevant Provision	Section 140(1)(c) of the ITA	Section 140A(2) and (3) of the ITA
B	Application	Power to disregard certain transaction if the DGIR believe that the transaction has the effect of altering, relieving, evading or avoiding any tax liability of a person or hindering the operation of the Act	Power to substitute and make adjustment to certain transaction entered between associated person to reflect an arm's length price.
C	Focus of the provision	General anti-avoidance provision which covers any act which has the effect of altering the incidence of tax of a person	Specific provision for transfer pricing
D	Subject matter	DGIR seek to disregard the existence of Ensco Labuan Ltd ('ELL') itself and deemed the transaction was made between the respondent and Ensco affiliate outside Malaysia, hence subject to withholding tax	The DGIR make adjustment to the amount of charter fee payment /lease price paid by the respondent to ELL as the price does not reflect an arm's length price.
E	Associated Person	The element of associated person is not a condition to invoke s 140 of the ITA. Hence, issue of associated person has never been raised during audit and only brought up during submission.	The element of associated person is a condition to invoke s 140A(2) and (3) of the ITA.
F			
G			

[35] Based on the above, we are of the considered opinion and we agree with DGIR that the differences between *Ensco Gerudi* (2013) and the present appeal are as follows:

- H
- (a) the use of different provisions of the ITA, s 140(1)(c) in *Ensco Gerudi* (2013), as against s 140A(2) and (3) of the ITA in the present appeal; and
 - (b) the difference in focus between the two provisions whereby:
- I
- (i) in *Ensco Gerudi* (2013), s 140(1)(c) of the ITA was used in relation to the existence of ELL itself; and
 - (ii) in the present appeal, s 140A(2) and (3) of the ITA was used to adjust the rig lease price paid by the respondent to ELL under the

transfer pricing audit as the price does not reflect the arm's length price.

A

[36] Even though both ss 140 and 140A of the ITA are anti-avoidance provision, however the application of these two provisions is different, in that s 140 of the ITA is wider, in that it includes all kinds of transactions which the DGIR has reason to believe to have the effect, among others, of altering, relieving or avoiding any tax liability of a person or hindering or preventing the operation of the ITA in any respect — s 140(1)(a), (b), (c) and (d). In such a situation, the DGIR is empowered to disregard or alter any transaction and make further adjustment which the DGIR deemed fits to counter the effect of such transaction.

B

C

[37] In *Ensco Gerudi* (2013), s 140(1)(c) of the ITA was used merely to disregard the transaction between the respondent and ELL and deemed the transaction was made between the respondent and the non-resident company.

D

[38] On the other hand, the application of s 140A is more specific and confined to the power of the DGIR to make adjustment and substitute the price on a particular transaction, if the DGIR is of the opinion that the transaction is not at arm's length, in particular to matters relating to transfer pricing and capitalization (see para 22, Explanatory Statement, Finance Bill 2008).

E

[39] The difference in the two provisions are as follows:

F

Section 140	Section 140A
Power to disregard certain transactions	Power to substitute the price on certain transactions
(4) The Director General, where he has reason to believe that any transaction has the direct or indirect effect of —	(1) This section shall apply notwithstanding s 140 and subject to any rules prescribed under this Act.
(a) altering the incidence of tax which is payable or suffered by or which would otherwise have been payable or suffered by any person;	(2) Subject to subsection (3), where a person in the basis period for a year of assessment enters into a transaction with an associated person for that year for the acquisition or supply of
(b) relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or to make a return;	property or services, then, for all purposes of this Act, that person shall determine and apply the arm's length price for such acquisition or supply.

G

H

I

A	Section 140	Section 140A
B	(c) evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by this Act; or	(3) Where the Director General has reason to believe that any property or services referred to in subsection (2) is acquired or supplied at a price which
C	(d) hindering or preventing the operation of this Act in any respect, may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the transaction and make such adjustments as he thinks fit with a view to counteracting the whole or any part of any such direct or indirect effect of the transaction.	is either less than or greater than the price which it might have been expected to fetch if the parties to the transaction had been independent persons dealing at arm's length, he may in determination of the gross income, adjusted income or adjusted loss, statutory income, total income or chargeable income of the person, substitute the price in respect of the transaction to reflect an arm's length price for the transaction.
D		

E [40] As such, we find that the *Ensco Gerudi* (2013) case cannot be said to be binding on the present case as the provisions relied on by the DGIR are different. In the present appeal, the DGIR's decision is premised on the new provision, s 140A of the ITA, whereby the DGIR made an adjustment on the rigs lease price paid by the respondent to ELL on the ground that based on the audit conducted, the lease price of the oil rig did not reflect the arm's length price and did not reflect the market price market price if the transaction was entered into between independent parties

G [41] This new provision (s 140A) is subject to its own interpretation, in particular the interpretation to the phrase 'enters into a transaction with an associated person for that year for the acquisition or supply of property' in s 140A(2). Section 140A(2) empowers the DGIR to make pricing adjustments in respect of transactions between associated persons to reflect an arm's length price. This goes to the issue of jurisdiction of the DGIR.

H [42] However, the respondent took the position that the DGIR is attempting to re-adjust the respondent's taxability under the guise of a 'different' provision under s 140A of the ITA, without regard to the fact that in *Ensco Gerudi* (2013), the learned judge has made findings of law and facts on the requirements of s 140(6) which are essentially the same as s 140A(5), on the issues of 'associated person' and 'control'. The learned judge also made the same finding:

[36] Returning to the *Ensco Gerudi* (2013) decision, the Court of Appeal had upheld the decision of the High Court in 2014. Four years later the respondent initiated the impugned audit herein ie, for the YAs 2012 to 2017. It is

- uncontroverted that the facts surrounding the operations of the applicant and ELL have remained the same. There is no change in facts surrounding the management of the entities to show that there has been a shift in the control since *Ensco Gerudi* (2013). A
- [37] *However, to circumvent the court's decision in Ensco Gerudi (2013) the respondent is now applying a different provisions of the ITA on essentially the same facts as that in Ensco Gerudi (2013).* The leasing transactions arising out of the master charter agreement entered between the applicant and ELL remains the subject of the current transfer pricing audit, as was the case back in 2013. The respondent's decisions led to the present judicial review application. The only difference is that the respondent now seeks to rely on the latest transfer pricing provision of s 140A of the ITA to make adjustments to the arm's length price of the applicant's transactions with ELL for the YAs 2012 to 2017. *This court agrees with the applicant's submission that the respondent is now attempting to re-adjust the applicant's taxability under the guise of a 'different' provision under s 140A of the ITA without regard to the fact that the High Court had already made findings of law and facts on the requirements of s 140(6) of the ITA which are essentially the same as s 140A(5) of the ITA. In addition thereto, the High Court had held that the applicant and ELL are not in control of one another and the decision was then affirmed by the Court of Appeal. (Emphasis added.)* B C D
- [43] We are of the considered opinion that there is no issue of the DGIR 'attempting to circumvent' the decision of *Ensco Gerudi* (2013). The new provision was enacted in 1 January 2009. Since the primary statutory duty of the DGIR is to collect taxes, the DGIR is statutorily empowered to collect taxes from the respondent pursuant to s 140A of the ITA, or any new law that was passed by Parliament. Failure to do so amount to a breach of statutory duty by the DGIR. In *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent (M) Sdn Bhd & Anor*, Zainun Ali FCJ went further and said that procedural impropriety should not be permitted to vitiate the DGIR's statutory duty to collect taxes: E F
- [126] ... To put it in a nutshell, the allegation of procedural impropriety ought not to be permitted to vitiate the appellant's statutory duty to assess and collect the correct amount of tax. G
- [44] As such, in answer to issue (i), we are of the considered opinion that the DGIR is not bound by the decision of *Ensco Gerudi* (2013) as the DGIR had acted on different provisions of the ITA. Therefore, the DGIR was acting within his jurisdiction and was not acting in excess of his jurisdiction when he decided against the respondent with regard to the tax assessments pursuant to s 140A of the ITA. H
- [45] Consequently, in answer to issue (iv), we find that since the DGIR had acted within his jurisdiction to impose the taxes under s 140A, this does not amount to an exceptional circumstances for a judicial review application. The substantive review application should have been dismissed for the parties to I

A proceed with their appeal before the SCIT. Indeed, it is an abuse of the process of the court for the respondent to apply for judicial review, whilst at the same time, prosecuting an appeal before the SCIT.

B *Are the respondent and ELL controlled by the same third person for s 140A of the ITA to be invoked?*

C [46] In order to make a finding on ‘associated persons’ under s 140A(2), the issue of control comes into play. Thus the next issue is whether the DGIR can invoke s 140A(2) if the issue of control has been resolved in the *Ensco Gerudi* (2013) case.

D [47] The respondent took the position that the pre-requisite ‘control’ test that applies to both ss 140(6) and 140A(2) are the same. In order to invoke either provisions against the respondent, the DGIR must establish that:

- (a) the respondent is in control of ELL or vice versa; and/or
- (b) the respondent is controlled by some other person who also has control over ELL.

E [48] The respondent then submitted that the issue of ‘control’ had already been decided in *Ensco Gerudi* (2013). This was accepted by the learned judge in para 37, where she made a finding that in *Ensco Gerudi* (2013), the learned judge has made a finding on the issue of control. The learned judge held as follows:

F ... In addition thereto, the High Court had held that the applicant and ELL are not in control of one another and the decision was then affirmed by the Court of Appeal.

G [49] The above finding is based on what the learned judge said in para [27] in *Ensco Gerudi* (2013):

H [27] This has clearly not been shown from the evidence tendered. There not an iota of evidence and submission to show that the applicant had transacted with ELL on a non-arm’s length basis ...

I [50] However, we are of the considered opinion and we agree with the DGIR that the High Court in *Ensco Gerudi* (2013) did not make a finding that the respondent and ELL are not associated persons. What Justice Zaleha in *Ensco Gerudi* (2013) had ruled was that the DGIR had failed to bring evidence to prove that the respondent and ELL are associated persons since the issue was only raised during submission. This is clearly stated by Her Ladyship in para 24 of the grounds of judgment:

[24] In the respondent’s submission, the respondent also now attempts to rely on s 140(6)

of Act 53 and allege that as the applicant and ELL allegedly belong within the same Group of Companies, therefore the respondent is allegedly entitled to come to an opinion that those transactions have not been made with one another at arm's length. With due respect, I agree with the applicant that this is new allegation and was never raised in the decision being challenged by the applicant. At no material time did the applicant was notified by the respondent that it is applying s 140(6) of Act 53 in coming to its decision. The respondent also did not at any material time state that it was of the opinion that the transaction is not made with one another at arm's length. This argument first arose in the written submissions filed by the respondent and not beforehand.

[51] In the following para, the learned judge went further to state that the DGIR had not bring any evidence to support the application of s 140(6) of the ITA:

[26] Furthermore, as submitted by the applicant, *there is no evidence to support the application of s 140(6) of Act 53 even if it is to be entertained by this honourable court.* The respondent must establish that a transaction between persons specified in the subsection is not one which would have been made by independent persons or similar activities dealing with one another at arm's length.

[52] Based on the paras 24 and 26 of the High Court judgment in *Ensco Gerudi* (2013) above, we agree with the DGIR that nowhere in the said judgment did Justice Zaleha hold, either direct or indirectly, that both the respondent and ELL are not associated persons or related, as stated by the learned judge in the present appeal when allowing the respondent's judicial review application.

Whether the respondent and ELL are associated persons

[53] In any event, we agree with the respondent that the DGIR cannot invoke s 140A(5A) as the same only took effect on 1 January 2019. For the purpose of the word 'control' under s 140A(5)(c) of the ITA, the relevant provision is s 139 of the ITA, which reads as follows:

(1) For the purposes of this Act, a person shall be taken to have control of a company —

- (a) if he exercises or is able to exercise or is entitled to acquire control (whether direct or indirect) over the company's affairs and in particular, without prejudice to the generality of the preceding words, if he possesses or is entitled to acquire the greater part of the share capital or voting power in the company;
- (b) if he possesses or is entitled to acquire either —
 - (i) the greater part of the issued share capital of the company;
 - (ii) such part of that capital as would, if the whole of the income of the

- A** company were in fact distributed to the members, entitle him to receive the greater part of the amount so distributed; or
- (iii) such redeemable share capital as would entitle him to receive on its redemption the greater part of the assets which, in the event of a winding up, would be available for distribution among members; or
- B** (c) if in the event of a winding up he would be entitled to the greater part of the assets available for distribution among members.

- C** [54] Under s 139 of the ITA, a person is deemed to acquire control over the company affairs upon the occurrence of any one of the two situations:
- (a) if he possesses or is entitled to acquire the greater part of the share capital in the company; or
- (b) if he possesses or is entitled to acquire the voting power in the company.

- D**
- E** [55] In this case, the facts clearly shows that the majority of shares in the respondent belongs to Ensco Oceanics Co LLC with 980,000 ordinary shares, which make up 49% of the total shares. The remaining 51% of shares were held by three different local companies, namely, Pacific Reward Sdn Bhd (3%), Crimson Bay Sdn Bhd (24%) and Prominent Vision Sdn Bhd (24%).

- F** [56] Therefore, even though the local companies held a total of 51% cumulatively, each of them held less shares than the Ensco group. As such, we are of the considered opinion that the learned judge had failed to consider the fact that the three local shareholders only hold 3%, 24% and 24% respectively in the respondent. The learned judge has erred in law and in fact when she literally combined the shareholding by the three different and separate entities in the respondent, in order to make a finding that a related company, Ensco Oceanics Co LLC is not a majority shareholder of the respondent. It is not for the learned judge to arbitrarily make a finding based on 51% shareholding for control within s 139, as this is not specifically provided for in s 139 itself.

- G**
- H** [57] As the three local companies are separate entities, each holding 3%, 24% and 24% of the shares respectively, they cannot be said to have control over the respondent as decided by the learned judge in her judgment. The learned judge had absolutely disregarded the 49% shares held by the Ensco group as the real majority shareholder of the respondent company, and this is in line with s 139 of the ITA.

- I**
- [58] In any event, we are also of the considered opinion that the issue of control is not just a legal issue but a factual issue as well. The issue of control is not just limited to 51% shareholding control as submitted by the respondent

and accepted by the learned judge. Section 139 provides several circumstances of control, including if the company possesses or is entitled to acquire the greater part of the share capital in the company or if the company possesses or is entitled to acquire the voting power in the company. The voting rights are factual issues which are best left to the SCIT.

A

B

Issue of pricing

[59] On the issue of pricing, this is a factual issue that is best left to the SCIT. We find that the learned judge fell into error when she agreed with the respondent's submission that the DGIR must prepare its own TP document to justify the adjustments made:

C

[48] ... So, *without a transfer pricing report, the applicant submits that it can only assume that no functional, asset and risk analysis was undertaken by the respondent and the respondent does not have good reasons to disagree with the applicant's transfer pricing documentation.*

D

[49] It is apparent that not only the applicant who is left in the dark as to how the respondent came to its transfer pricing adjustments *The court for that matter is deprive from knowing the respondent's version of what the transfer pricing report ought to be. What are the factors did the respondent consider?* Did it perform the most perfunctory functional and economic analysis? What are the comparables used in the economic analysis and for that matter, did the respondent comply with its own transfer pricing guidelines? (Emphasis added.)

E

[60] In a transfer pricing audit exercise, the TP documents are prepared by the taxpayer to justify their dealings with their related parties (associated person) that was conducted at arm's length. All the information in relation to the company's affairs, transactions, relationship between parties etc are information within the knowledge of the taxpayer and with these information, a taxpayer prepares their TP documents based on the transfer pricing Guidelines issued by the DGIR. The TP documents will then be sent to the DGIR who will then conduct an audit on the TP documents prepared by the respondent taxpayer. It is not for the DGIR to prepare their own TP documents on matters which are absolutely within the knowledge of the respondent.

F

G

H

[61] In any event, we are of the considered opinion that the DGIR had in fact given reasons for the adjustments to the respondent. In three separate letters dated 23 October 2019, 30 January 2020 and 22 June 2020, the DGIR had clearly laid down the reason for the adjustment.

I

[62] In DGIR's letter dated 23 October 2019, the DGIR had in para 3 of the 'Lampiran 1' given the findings based on the audit conducted on the

A respondent's TP documents perusing the said para the DGIR had in fact made an analysis on both the respondent and ELL.

B [63] Added to that, in the letter dated 22 June 2020, the DGIR once again explained in detail the reason for the decision to make the adjustments contrary to the learned court judge's findings in para [49] of the judgment, in this letter, the DGIR had explained how they concluded that the respondent and ELL are associated persons within the meaning of s 140A(2) of the ITA, the operational structure of the respondent which involved other affiliate companies within the Ensco Group of Companies The DGIR has also in this letter explained to the
C respondent why the DGIR rejected the method used by the respondent in the following para:

D *EGMSB tidak menggunakan kaedah transaksi tradisional ('traditional transactional method') dan memilih untuk menggunakan kaedah keuntungan transaksi ('transactional profit methods') iaitu transactional net margin method ('TNMM') dalam dokumen-dokumen pindahan harga yang telah disediakan bagi menjustifikasikan transaksi antara syarikat berkaitan yang dibuat. Melalui kaedah ini EGMSB telah memilih beberapa syarikat perbandingan. Mark-up on Value Added Cost ('MUVAC') EGMSB akan dibandingkan dengan julat inter-quantile bagi*
E *Mark-up on Total Cost ('MOTC') syarikat-syarikat perbandingan. EGMSB menggunakan MUVAC kerana berpandangan bahawa kos pajakan pelantar carigali merupakan pass through cost dan tidak perlu dimasukkan dalam MOTC syarikat. Dengan kaedah ini, net margin EGMSB akan berada pada julat inter-quantile yang munasabah ...*

F Dari perbandingan, EGMSB berada dalam julat inter-quantile syarikat-syarikat perbandingan. Oleh itu EGMSB berpendirian bahawa transaksi antara syarikat-berkaitan telah memenuhi prinsip Harga Selengan ('Arm's Length').

G Namun begitu, dari penelitian yang dibuat pada dokumen-dokumen pindahan harga EGMSB serta dokumen-dokumen lain yang dipohon, *Pegawai audit berpendapat kaedah TNMM yang digunakan oleh EGMSB adalah kurang tepat kerana penggunaan Profit Level Indicator ('PLI') yang tidak selari antara EGMSB dengan syarikat-syarikat perbandingan iaitu antara kaedah MUVAC dan kaedah MOTC. Disamping itu transaksi Pindahan Harga yang menjadi pertikaian hanyalah transaksi yang dilakukan antara EGMSB dengan ELL yang berkaitan*
H *belanja pajakan pelantar carigali yang dibayar EGMSB Pelantar carigali yang dipajakkan oleh ELL itu diperolehi dari syarikat berkaitan diluar negara. Jadual dibawah menunjukkan analisa fungsi antara syarikat EGMSB dan ELL berkaitan transaksi tersebut ...*

I Dari fungsi yang dikemukakan juga, dapat dilihat bahawa transaksi antara EGMSB dan ELL adalah saling berkait dengan aset (pelantar carigali) yang digunakan oleh EGMSB dalam kontrak dengan pelanggan. Setiap pelantar carigali yang dipajakkan ini adalah unik berdasarkan keperluan setiap pelanggan EGMSB. *Oleh sebab itu, berdasarkan sub perenggan 11.4.1(a) Garispanduan Pindahan Harga 2012 dan Perenggan 2.65 OECD transfer pricing Guidelines For Multinational Enterprise and Tax Administrations 2017, kaedah TNMM kurang sesuai digunapakai. Disamping*

- itu, keuntungan yang dipertikaikan telah dikenalpasti, iaitu margin yang diperolehi oleh ELL berjumlah 20% dari pelantar carigali yang dipajakkan kepada EGMSB seperti yang dikehendaki oleh Perenggan 2.114 OECD transfer pricing Guidelines For Multinational Enterprise and Tax Administration 2017. (Emphasis added.) A
- [64] Essentially, one of the disputes between the parties was the accounting method applied by the respondent. The respondent did not apply the traditional transactional method, but had applied the transactional profit methods, namely the transactional net margin method ('TNMM') in the pricing. This can also be seen from the correspondences between the parties by a letter dated 22 June 2020 the DGIR issued the final audit findings where the DGIR had rejected the respondent's use of the TNMM method and had applied the transactional profit split method instead. In response, the respondent reiterated in a letter dated 10 July 2020, that based on the detailed analysis set out in TP documents, the TNMM method is the most appropriate transfer pricing methodology. B C D
- [65] Surely the application of the different accounting methodology and their consequences must be left to the accounting experts to argue before the SCIT. Indeed, the learned judge was also of the opinion that transfer pricing are complex matters and can never be straightforward: E
- [50] It has been said that additional assessment is rooted in fairness and that there is a duty on the part of the respondent being an important public authority to give its reasons more so, when the *issues pertaining to transfer pricing are complex matters and can never be straightforward*. (Emphasis added.) F
- [66] The courts are not experts in accounting and will not be able to ascertain the arm's length pricing from reading the affidavits and the TP documents alone. These are essentially factual issues that must be decided by the SCIT, after hearing the oral evidence of the parties concerned, including the tax and accounting experts. It is trite law that SCIT are the judges of facts (see *Kerajaan Malaysia v Dato' Hj Ghani Gilong* [1995] 2 MLJ 119; [1995] 3 CLJ 161). G
- [67] In fact, the respondent referred to the case *MM Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] MSTC 10-046, on the issue of transfer pricing, where the Special Commissioners of Income Tax held that: H
- Based on the above citation, we the Special Commissioners are aware of the respondent's version of the shortcomings in the appellant's transfer pricing reports, but we do not know what is the respondent's version of what the transfer pricing reports ought to be in this case, not to mention that such respondent's version (if it existed) of the reports were not put to the appellant's witnesses. I
- Hence, the respondent is in breach of the principle enunciated in *Aik Ming's* case.

A [68] From the case of *MM Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* itself, the issue of transfer pricing is a finding of fact by the SCIT. We reiterate here that the courts are not the proper forum to decide on the merits of the transfer pricing as the same should be resolved by the SCIT.

B [69] In *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd*, the Federal Court held that:

C [60] Had the respondents filed an appeal before the Special Commissioners, where the onus is on the respondents to establish their position, they will be accorded every opportunity to show where the appellant went wrong. *The respondents may request for the attendance of witnesses to give evidence on oath and request any witness to produce any books, papers or documents which are in his custody or his control necessary for purposes of the appeal. Therefore, before the Special Commissioners the respondents will have all the opportunity to ventilate his disgruntlement, with every opportunity to undo what the appellant determined* (see *Director-General of Inland Revenue v Lahad Datu Timber Sdn Bhd* [1977] 1 LNS 26; [1978] 1 MLJ 203). (Emphasis added.)

D [70] In her supporting judgment in the same case (*Alcatel-Lucent*), Justice Zainun Ali FCJ held as follows:

E [127] A party who is dissatisfied with an assessment or administrative decision issued by the Revenue under ss 109 or 109B is not left without any remedy. In the circumstance of this case, *if it is dissatisfied with the assessment or notice of assessment issued by the appellant, the first respondent ought to have exercised its right to appeal under s 99 of the Act*. Before the Special Commissioners, the first respondent would have an opportunity to make known its dissatisfaction. It will have the opportunity to tender exhibits, and give evidence if necessary.

F [128] Thus the first question is answered in the negative. The letter of the Director General of Inland Revenue dated 14 April 2008 referring to both ss 109 and/or 109B of the Income Tax Act 1967 holds good and is therefore not bad in law.

G [129] Referring to question No 2, *since the respondents failed to file an appeal to the Special Commissioners under s 99 of the Act, the court should not delve into the merits of the matter which in any case ought to be resolved by the Special Commissioners* On this, we agree with the view expressed by our learned brother Suriyadi FCJ at paras 56–64 of his judgment. Thus question 2 need not be answered. (Emphasis added.)

H [71] Gill FCJ in *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163; [1973] 1 LNS 144 had occasion to state this:

I The doors of justice are not shut to him merely because its claimant is the Government, *but he has to enter the doors of the Special Commissioners first to raise the plea of non-observance of the principle of natural justice or to establish that the Director-General acted arbitrarily and in a non-judicial manner. It is only after he has availed himself of that remedy as laid down by the law that he has a right to come to the courts*. (Emphasis added.)

[72] For the reasons enumerated above, the learned judge was plainly wrong when she went into the merits of the transfer pricing, accepted the respondent's submission and quashed the DGIR's decision. Whilst acknowledging that the transfer pricing issue is a complex matter, the learned judge should have dismissed the review application for the parties to litigate the transfer pricing issue before the SCIT.

A

B

Does the DGIR have a duty to give reasons for its decisions, and if so, has the DGIR breached that duty?

[73] In the High Court, the learned judge made a finding that the DGIR had failed to give proper reasons or explanations:

C

[31] It is settled law that the respondent, as a public decision-making body, is under a duty to give reasons for its decisions (see the Federal Court's decision in the *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590; [2017] 4 CLJ 265 and *Pahang South Union Minibus Co Bhd v Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199). The duty to give reasons was recently affirmed by the Federal Court in *Uniqlo (Malaysia) Sdn Bhd v Ketua Pengarah Kastam Dan Eksais* [2020] MLJU 1030.

D

E

...

[49] *It is apparent that not only the applicant who is left in the dark as to how the respondent came to its transfer pricing adjustments. The court for that matter is deprived from knowing the respondent's version of what the transfer pricing report ought to be. What are the factors did the respondent consider? Did it perform the most perfunctory functional and economic analysis? What are the comparable used in the economic analysis and for that matter, did the respondent comply with its own transfer pricing Guidelines? (Emphasis added.)*

F

[74] We are of the considered opinion that the learned judge has failed to consider the exchange of correspondences between the DGIR and the respondent on the assessments, including the contents of such correspondences. After the audit in October 2018, the DGIR had in fact given reasons for the adjustments to the respondent. In three separate letters dated 23 October 2019, 30 January 2020 and 22 June 2020, the DGIR had clearly laid down the reasons for the adjustment.

G

H

[75] In the letter dated 22 June 2020, in responding to the respondent's letter dated 22 November 2019 and 3 December 2019, the DGIR once again explained in detail the reasons for making the adjustments. In this letter, the DGIR had explained how they concluded that the respondent and ELL are associated persons within the meaning of s 140A(2) of the ITA, the operational structure of the respondent involving other affiliate companies within the Ensco Group of Companies. In this letter, the DGIR has also explained to the

I

A respondent why the DGIR rejected the method used by the respondent.

[76] The DGIR had also considered the respondent's letters dated 22 November 2019, 3 December 2019, 28 February 2020 and 10 July 2020, disputing the DGIR's audit findings. The parties even had a discussion on the matter on 11 February 2020 at the DGIR's office. From the above facts, it cannot be said that the respondent was 'left in the dark' on the issues between the parties

C [77] In *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd*, the Federal Court held that in tax cases, there is no statutory provisions that mandated the DGIR to give reasons:

D [91] *Guided by those persuasive cases, judicial interference therefore should be on a case by case basis.* As regards this appeal, we also find *no statutory provision that demands the appellant to supply reasons why the first respondent is duty bound to pay the withholding tax.* Apart from the want of a statutory provision demanding the supplying of reasons, in the *circumstances of the case, with there being more than ample documents or reasons surfacing in the course of the negotiations which are self-explanatory, the need to give an overt explanation is superfluous.*

E [92] The Court of Appeal here, en route to its decision merely reproduced and discussed a plethora of cases on the trite law or issues regarding the law of judicial review, rather than highlighting where the appellant went wrong prior to making its decision.

F [93] *To avoid falling into the same trap of the subordinate courts, after sifting through the available material regarding the decision-making process, we find that the appellant had:*

- (a) negotiated with the respondents;
- G (b) exchanged correspondences with the respondents. The first was the letter of 31 October 2007;
- (c) there was even a finding of facts (see para 4 of the COA grounds of judgment) that several meetings and exchanges of correspondences took place between the appellant and the respondents;
- H (d) the sum was then reduced to RM1,781,274;
- (e) a further representation was made by the first respondent and the withholding tax was reduced to RM1,507,674.80 as per the appellant's letter dated 28 March 2008;
- I (f) then came the impugned letter of 14 April 2008 in which appendix 1 was appended detailing out the amount to be paid and making reference to the relevant provisions;
- (g) the respondents protested vide letter dated 28 April 2008; and

- (h) the appellant warning the respondents of the repercussion of non-payment in both the letters of 28 March 2008 and 14 April 2008. (Emphasis added.)

A

[78] We are therefore of the considered opinion that the DGIR had explained the reasons for his decision, as can be seen from the correspondences between the parties. In any event, in the circumstances of this case, there are ample documents in the course of the negotiations between the parties which are self-explanatory, hence the need to give an overt explanation is redundant. As to whether the said reasons of the DGIR can be accepted, that will be up to the SCIT to make a finding. Therefore, it cannot be said that the DGIR had failed to explain the reasons to the respondent.

B

C

Issue of limitation under s 91(3) of the ITA

D

[79] The respondent took the position that under s 91(5) of the ITA, the DGIR has a seven-year period to raise an assessment or additional assessment in respect of transfer pricing adjustments s 91(5) of the ITA reads:

The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax in consequence of the Director General's determination pursuant to sub-s 140A(3), may in that year or within seven years after its expiration make an assessment or additional assessment, as the case may be, in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year.

E

F

[80] In this case, since the DGIR had raised its assessment for YA 2012 on 22 July 2020, the seven-year period had lapsed. The only exceptions to lifting the time-bar are provided under sub-s 91(3) of the ITA:

G

The Director General where it appears to him that —

- (a) any form of fraud or wilful default has been committed by or on behalf of any person; or
(b) any person has been negligent,

H

in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question.

I

[81] The learned judge held that the DGIR's failure to particularise the basis for the exercise of its powers under s 91(3) is fatal, and the court is entitled to infer that there is no good reason to do so:

[62] The respondent's failure to particularise the basis for the exercise of its powers

A under s 91(3) is fatal, and the court is entitled to infer that there is no good reason to do so (see *Pahang South Union Minibus Co. Bhd v Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199).

B [82] However on this issue of limitation, we are of the considered opinion that the SCIT have the jurisdiction to consider, not only as to whether the amount of tax sought to be recovered is excessive, incorrectly assessed or incorrectly increased, but includes a plea of limitation (see *Kerajaan Malaysia v Dato' Hj Ghani Gilong* [1995] 2 MLJ 119; [1995] 3 CLJ 161).

C [83] In fact, the cases that were referred to by the respondent regarding the issue of s 91(3) of the ITA were from the High Court on appeal, from the decisions of the SCIT on a finding of fact. Since the exceptions include fraud, wilful default or negligence, these issues cannot be decided by the learned judge based on mere affidavits. These are factual issues that can only be decided by the SCIT after a full hearing.

CONCLUSION

E [84] In the present appeal, we find no exceptional circumstances that warrant the learned judge to quash the notices of assessments issued by the DGIR. The subject matter of this appeal is not similar to the *Ensco Gerudi* (2013) case that binds the DGIR as an inferior tribunal. Both cases are on different provisions of the law and the interpretation of s 140A is subject to a finding of fact, which can only be done by the SCIT, inter alia, on the transfer pricing. It is also trite law that the SCIT have the power to hear a question of mixed facts and law.

G [85] In conclusion, for the aforesaid reasons, we find that the learned judge has erred in her findings and conclusions that warrant our appellate intervention. We therefore allow the appeal and set aside the decision of the learned judge with costs to DGIR.

Appeal allowed and High Court's decision set aside.

H Reported by Ashok Kumar

I